Supreme Court, U. S.
FILED
JUL 15 1980
MICHAEL RODAK, JR., CLERK

No. 79-1646

In the Supreme Court of the United States

OCTOBER TERM, 1979

WEST GULF MARITIME ASSOCIATION, PETITIONER

v.

PORT OF HOUSTON AUTHORITY,
FEDERAL MARITIME COMMISSION AND
THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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1. The Port of Houston Authority ("PHA") is a governmental agency of the State of Texas which owns and operates the public facilities at the Port of Houston. Texas law requires PHA to establish fees and charges for use of the port sufficient to produce the revenue necessary to carry out its responsibilities.

From at least 1933 to 1964, PHA billed and collected wharfage from vessels and their agents, although it considered the charge as accruing to cargo (Pet. App. A-

7, A-27).[1] In response to requests made by the vessel owners and agents, PHA changed its wharfage billing and collection practices in 1964 by shifting liability for wharfage charges to the cargo interests exclusively (Pet. App. A-7). The new system, however, proved inordinately expensive due to the need to bill each shipment individually, rather than billing on a per vessel basis (*id.* at A-30). In addition, charges often were uncollectable, because the information needed for proper billing was not available until after the cargo left the terminal, and the persons liable for payment were overseas (*id.* at A-30 to A-32).

These difficulties led PHA to reinstitute, over the protests of petitioner West Gulf Maritime Association,[2] the practice of billing the vessel interests for wharfage charges. Its new tariff, issued in 1975, obliged them to guarantee collection and allowed vessels and vessel agents a four percent "discount" on the charges collected as compensation (*id.* at A-8, A-23, A-28).[3]

Petitioner filed a complaint with the Commission contending that these billing practices were unjust and

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[1]Federal Maritime Commission regulations define wharfage as (46 C.F.R. 533.6(d)(2)):

> A charge assessed against the cargo or vessel on all cargo passing or conveyed over, onto, or under wharves or between vessels (to or from barge, lighter, or water), when berthed at wharf or when moored in slip adjacent to wharf. Wharfage is solely the charge for use of wharf and does not include charges for any other service.

[2]West Gulf is a trade association composed of almost all steamship agents representing the operators of deep-sea cargo vessels using the ports of the Gulf of Mexico from Lake Charles, Louisiana, to Brownsville, Texas. It also includes some vessel owners and stevedoring firms (Pet. App. A-4).

[3]Similar tariff provisions are in effect at other major Gulf Coast ports in Texas and Louisiana (Pet. App. A-28 to A-29).

unreasonable under Section 17 of the Shipping Act of 1916 (46 U.S.C. 816). The administrative law judge (Pet. App. C) and the Commission (Pet. App. B) upheld them. The court of appeals affirmed without opinion (Pet. App. A).

2. Petitioner contends (Pet. 8-13) that PHA's tariff is unlawful because it conflicts with Texas law. It argues that requiring vessel agents to collect wharfage charges owing to PHA has the effect of requiring the vessel agents to become the agents of PHA without their consent, and without an agreement in writing, in violation of Texas law. But whether or not that is so, it does not follow that PHA's tariff is unreasonable under Section 17 of the Shipping Act of 1916 (46 U.S.C. 816; Pet. 4-5). As the Commission observed: "The simple answer to * * * these assertions is that, while tenets of state and common law may be evidence of reasonableness and of local business practices, they are not alone dispositive of Shipping Act issues, absent a showing that these principles directly apply to Shipping Act considerations" (Pet. App. A-15). Congress has not delegated to the states, rather than to the federal administrative agency charged with developing the nation's maritime policy, the controlling decision making authority with respect to the reasonableness of the regulations and practices of port facilities serving vessels moving in interstate and foreign commerce.

Here, the Commission was clearly correct in finding that PHA's practice of requiring vessels and vessel agents to guarantee wharfage charges was reasonable, whatever the incidental impact of state law considerations. The practice of billing vessel agents for wharfage charges was followed by PHA from at least 1933 through 1964, and has been in effect again in Houston since 1975 (Pet. App. A-27 to A-28). A similar practice by the Port of New

Orleans goes back at least to World War I and probably earlier (Pet. App. A-28 to A-29), and the Commission has approved the same practice in Boston and San Diego (*id.* at A-36 to A-40). Moreover, Commission regulations expressly recognize that wharfage charges may properly be assessed against the cargo or vessel (46 C.F.R. 533.6(d)(2); Pet. App. A-24 n.9); *American President Lines, Ltd.* v. *Federal Maritime Bd.*, 317 F.2d 887, 888 (D.C. Cir. 1962); *Boston Shipping Ass'n* v. *Port of Boston Marine Terminal Ass'n*, 11 F.M.C. 1, 9 (1967)).

The thorough opinion of the presiding officer who conducted the hearing before the Commission in this case demonstrates the efficiencies in collection realized as a result of PHA's looking to the vessel or vessel agent for wharfage charges attributable to the vessel rather than to the shippers of each lot of cargo that may be on board (Pet. App. A-29 to A-33). Petitioner does not challenge the sufficiency of the evidence supporting this conclusion. In addition, PHA gives vessels and vessel agents a four percent allowance to compensate them for the collection of charges, the reasonableness of which petitioner also does not challenge. Finally, as the Commission recognized (*id.* at A-13), the vessels and their agents *are* the users of the port facilities, and it is entirely reasonable that they and their agents should be responsible for payment of wharfage fees. Compare *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520-521 (1939).

In any event, petitioner's members are hardly the victims of commercial duress with respect to the condition of the tariff that they guarantee the payment of wharfage. The published tariff simply operates as a unilateral offer to contract, and by using the terminal facilities, the vessels

and their agents accept the offer.[4] The cases cited by petitioner on "implied duress" under Texas law (Pet. 11), even assuming they have any relevance here, hold only that a person who pays taxes or utility bills under certain circumstances does not waive his right to seek recovery of any overpayment. *Texas Power & Light Co.* v. *Doering Hotel Co.*, 147 S.W. 2d 897 (Tex. Civ. App. 1941), aff'd, 139 Tex. 351, 162 S.W. 2d 938 (1942); *Austin Nat'l Bank* v. *Sheppard*, 123 Tex. 272, 277-278, 71 S.W. 2d 242, 245-246 (Comm'n App. 1934). The ultimate right to recovery in those cases depended on the substantive illegality of the exactions, not on the fact that they had been collected under duress. In this case the Commission correctly upheld the reasonableness of the tariff in question.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1980

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[4]The terms of tariffs filed by terminal operators with the Commission become part of any agreement for use of terminal facilities. *Rorie* v. *City of Galveston*, 471 S.W. 2d 789, cert. denied, 405 U.S. 988 (1972); *City of Galveston* v. *Kerr Steamship Co.*, 362 F. Supp. 289 (S.D. Tex. 1973), aff'd mem., 503 F.2d 1401 (5th Cir. 1974), cert. denied, 420 U.S. 975 (1975).